NO. 48430-7-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

In re the Personal Restraint of:

FORREST AMOS,

Petitioner.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR LEWIS COUNTY

REPLY BRIEF OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

A. ARGUMENT IN REPLY

1. MR. AMOS IS NOT PRECLUDED FROM COLLATERAL ATTACK

In its response, the State argues that by pleading guilty in conjunction with the agreement into which he entered on August 20, 2014. Mr. Amos waived the ability to file this petition. The case law cited by the State as authority for this proposition does not support its claim.

The plea agreement does not waive his right to complain of violations of the due process clause and the right to a constitutional sentence. Violations of his right to counsel and the validity of the sentence imposed are the crux of the petitioner's complaints raised in his petition. In particular, Mr. Amos submits that the intrusion into the attorney client relationship, which reached its apex during the search of his cell at the Lewis County Jail on June 18, 2014, which resulted in the seizure of material in his cell, including documents prepared by Mr. Amos for use of his trial counsel in the defense of his case. As discussed in his petition and supplemental pleadings, the intrusion was significant, deliberate, unwarranted, and resulted in prejudice per se. See, ***State v. Perrow***, 156 Wn. App. 322, 231 P.3d 853 (2010). Intrusion into private attorney-client communications violates a defendant's right to effective representation and due process. State v. Cory, 62 Wash.2d 371, 373–74,

382 P.2d 1019, 5 A.L.R.3d 1352 (1963). The search and its aftermath, characterized irregularities such as an in camera review of the material seized at which only the officer responsible for seizing the material was present and which was not recorded, resulted in the destruction of Mr. Amos' confidence in his attorney. The government's intrusion was sufficiently egregious to destroy Mr. Amos' confidence in his counsel, resulting in an agreement to plead guilty and ostensibly, to waive direct appeal or further collateral attack of the convictions. The State's intrusion was such that the resulting prejudice to Mr. Amos is sufficient that warrant dismissal.

> Prejudice can manifest itself in several ways. It results when evidence gained through the interference is used against the defendant at trial. It also can result from the prosecution's use of confidential information pertaining to the defense plans and strategy, from government influence which destroys the defendant's confidence in his attorney, and from other actions designed to give the prosecution an unfair advantage at trial.

United States v. Irwin, 612 F.2d 1182, 1187 (9th Cir.1980) (footnote omitted). Courts are undecided as the appropriate remedy for the odious practice of eavesdropping or otherwise gathering privileged information. In circumstances in which the prejudice may be contained by suppressing evidence or ordering a new trial, dismissal is not required.

Shillinger v. Haworth, 70 F.3d 1132, 1143 (10th Cir.1995). In other circumstances, "an intrusion could so pervasively taint the entire proceeding that a district court might find it necessary to take greater steps to purge the taint," including dismissal. *Id.* Mr. Amos submits that his case fits the latter category, and that the prejudice permeated each aspect of his case, including the agreement signed ostensibly waiving further appeal.

The intrusion resulted in the seizure of material that could be used against Mr. Amos at trial and the intrusion destroyed his confidence in his attorneys. Mr. Amos did not agree to waive the right to effective assistance of his counsel, and did not agree to waive the ability to show the court, through collateral attack, that he had no confidence in his attorney due to the seizure of the materials, that the state had gained an unfair advantage, and that dismissal was the appropriate remedy.

Mr. Amos also submits under the agreement not to seek review, he did not and could not agree to an illegal sentence. As argued previously, the sentence imposed is in violation of ***State v. Besio***, Wn. App. 426, 907 P.2d 1220 (1995) and resulted in a sentence not authorized by RCW 9A.20.021(2) and therefore was not valid on its face.

United States v. Broce, 488 U.S. 563, 569, 109 S.Ct. 757, 102 L.Ed.2d 927 (1989) is instructive. In that case, the court found that the

ability to attack a guilty plea exists where on the face of the record the court had no power to enter the conviction or impose the sentence. *Id.*

Mr. Amos argues that under ***Besio***, the judgment and sentence is invalid on its face, so his petition fits within the exception. The guilty plea must also have been voluntarily and intelligently made. Here, there is no evidence to suggest that Mr. Amos understood that by pleading guilty and agreeing to waive further appeals, he would as receive a sentence that is contrary to ***Besio***.

2. THE STATE'S ACTIONS CONSTITUTED AN EGREGIOUS INTRUSION INTO ATTORNEY CLIENT PRIVILEGE MERITING DISMISSAL UNDER *PERROW*.

During the course of prosecution of his criminal case, while he was held in the Lewis County Jail, the State knowingly and deliberately violated Mr. Amos' constitutional right to a confidential relationship with his trial attorney. As argued in his petition and subsequent pleadings, the State intruded into his attorney-client relationship in several ways, but the most egregious intrusion occurred when the State, by using a search warrant issued by a municipal court, seized documents that contained privileged attorney-client communications. The State gained significant benefits from this violation, primarily by having access to materials he specifically created for his attorney for use in his defense in his then-

pending criminal trial. Due to the clear, unmistakable intrusion into his attorney client relationship, prejudice must be presumed.

A defendant's right to effective counsel is protected by the Sixth Amendment of the federal constitution and article I, section 22 of the state constitution. Intrusion into private attorney-client communications violates a defendant's right to effective representation and due process. ***State v. Cory***, 62 Wn.2d 371, 374-75, 382 P.2d 1019 (1963). Dismissal of a case is warranted when the State's intrusion into the defendant's attorney-client communications is both deliberate and egregious. A State's intrusion is deliberate and egregious when the intercepted communications are those between the defendant and his counsel in the case being tried. See ***Cory***, 62 Wn.2d at 374-375. In ***Cory***, the defendant met with his attorney to discuss his case in a private jail room, where a sheriff's deputy had secretly installed a microphone to eavesdrop on their conversations. *Id.* at 372. Our Supreme Court concluded that dismissal was the only appropriate remedy, because it was impossible to isolate the resulting prejudice. *Id.* at 377–78. See also, ***State v. Granacki***, 90 Wn. App. 598, 600, 959 P.2d 667 (1998). In both ***Cory*** and ***Granacki***, the respective courts found dismissal appropriate to discourage such deliberate and egregious intrusions into the defendant's attorney-client privilege. Here, the same elements that outraged the courts in ***Cory*** and ***Granacki*** are

present.

The intrusion in ***State v. Perrow***, *infra*, which also resulted in dismissal, is also compelling in its similarity to the facts in the present case. In ***Perrow***, detectives seized documents pursuant to a search warrant that included notes the defendant wrote in preparation for meeting with his attorney about the allegations against him. ***State v. Perrow***, 156 Wn.App. 322, 326, 231 P.3d 853 (2010). Perrow informed the detectives that they had seized privileged materials. *Id.* Nevertheless, one detective then read through the privileged documents page by page and prepared a written analysis of them and forwarded it to the prosecutor's office. *Id.* Division Three concluded that the trial court did not abuse its discretion in dismissing the defendant's charges, because it was impossible to isolate any resulting prejudice. *Id.* at 332, 231 P.3d 853.

Here, the intrusion involved seizure of documents prepared for counsel prior to trial. Although government officials averred that it did not review the documents seized, the facts strongly suggest otherwise.

Oddly, the warrant to search Mr. Amos' jail cell, which is under the auspices of the Lewis County Sheriff's Office, was issued by a municipal court in a neighboring city. RP (7/18/14) at 30. Almost unbelievably, as late as July 24, 2014, the State was unclear as which specific court had authorized the warrant, RP (7/24/14) at 6.

Trial counsel brought the seizure to the court's attention, and at a review hearing on July 10, 2014, Deputy Prosecuting Attorney Will Halstead suggested the court conduct an *in camera* review of the materials, pleadings, and letters seized by law enforcement from Mr. Amos' cell pursuant to the search warrant was merited. RP (7/10/14) The court initially expressed reluctance for *in camera* review, stating that no motion had been filed for such review. RP (7/10/14) at 11. Defense counsel noted its objection to review, stating that the seized material should be returned to Mr. Amos. RP (7/10/14) at 11. No motion appears in the record for *in camera* review of the documents seized from Mr. Amos.

The violation left Mr. Amos without the ability to communicate effectively with his counsel. The damaging affect the intrusion had on his case is manifest; the seizure included documents pertaining to the defense of his pending criminal matter including a material from his previous attorney Chris Baum which discussed potential witness testimony. Mr. Blair, seeking to have the documents returned for use in the preparation of the case, was directed by the court on July 18, 2014, to produce a list of the missing documents. RP (7/18/14) at 29. Trial counsel stated that at a hearing on July 24, 2014, he had yet to even receive a copy of the affidavit in support of the warrant and had not received a return on the materials

seized by July 18; at that point counsel was unaware even of what specifically had been seized by law enforcement. RP (7/24/14) at 5.

As was the case in ***Perrow***, is it clear that the officers, specifically – Deputy Sheriff Adam Haggerty - read the material while searching Mr. Amos' cell. During a hearing on the issue on July 24, 2014, Deputy Prosecuting Attorney Eric Eisenberg stated:

> I do know that in—whichever report that I saw very cursorily about this case or maybe it was something related to the warrant that Haggerty—Officer Haggerty just said to me—he mentioned that when they went to serve the warrant, Mr. Amos had specifically told them that he had materials in there related to a civil suit. And so as he described it, they very cursorily, very briefly just flipped through things to find stuff that was heading for his civil suit to leave it because he requested that.

RP (7/24/14) at 6-7.

The State also confirmed that the seized material was held by law enforcement for an undetermined amount of time. DPA Eisenberg told the court "I do know, because I'm the person who advised him to do this—that Officer Haggerty was instructed by me not to look at any of the material and to give them to a judge so that the judge could review it to see what was privileged before he looked at it, and I made that request to him specifically out of concern that it otherwise might be considered eavesdropping on attorney-client privileged materials." RP (7/24/14) at 7.

This was contradicted, however, by the affidavit of Officer Haggerty dated March 22, 2016, in which he stated that the "contents of the bag/box were not examined by myself or any other member of law enforcement". Affidavit of Haggerty at 2.

Regarding the appropriate remedy, Mr. Amos submits that the error is structural; where the State intrudes into the defendant's attorney-client relationship, particularly in the manner done here, the State's intrusion is structural error, requiring a presumption of prejudice and automatic dismissal.[1]

In ***Granacki***, and in ***State v. Garza,*** 99 Wn. App. 291, 994, P.2d 868, (2000), the courts rejected the violation as a structural error requiring automatic reversal. In ***Granacki***, the Court noted that governmental misconduct generally does not require dismissal absent actual prejudice to the defendant. 90 Wn.App. at 604. The Court held that the trial court may choose to impose a lesser sanction. In ***Garza***, the court recognized that dismissal is not required where prejudice is contained by suppressing the evidence or ordering a new trial. ***Garza***, 99 Wn.App. at 300. The ***Garza*** Court held that if the trial court found on remand that the jail officers' actions violated the defendants' right to counsel, it had discretion to

[1]Examples of structural error include complete deprivation of counsel, a biased trial judge, racial discrimination in the selection of a grand jury, and denial of the right to self-representation. ***State v. Paumier***, 176 Wn.2d 29, 46, 288 P.3d 1126 (2012);

fashion the appropriate remedy. *Id.* at 301–02. The court noted that dismissal is an extraordinary remedy, appropriate only when less severe sanctions will be ineffective. *Id.*

The seizure here is as disturbing and frankly outrageous as that in ***Perrow***, where the detective knew documents were privileged when he analyzed them and sent them on to the prosecutor's office. 156 Wn.App. at 326. Here, law enforcement specifically sought written material, knowing that it would *a priori* contain privileged information because Mr. Amos was being held pending trial and because he was represented by counsel. Despite this, law enforcement apparently treated the material haphazardly by collecting it in a bag or box and holding it, and clearly read it—at least while in the cell performing the search---as evidenced by DPA Eisenberg's statement to the court. Searching Mr. Amos' jail cell to discover confidential communications was at least as intrusive as the police action in ***Perrow***. In fact, the State's actions are arguably more egregious than even that of ***Perrow***. Here, the impropriety of the State's action was compounded by the State's *laissez faire* attitude toward the original warrant. The prosecutor professed no knowledge of the contents of the supporting affidavit and was even unsure which court issued the warrant. Rather than exercise due diligence and inquire as to which agency had requested the warrant, the prosecutor was apparently

bewildered by the mystery warrant.

The claim of structural error is made even stronger because the intrusion into the attorney client confidentiality occurred during a critical stage in the proceedings. Under both the Washington and United States Constitutions, a criminal defendant is entitled to the assistance of counsel at critical stages in the litigation. U.S. Const. amend. VI; Washington. Const. art. 1, § 22; ***State v. Everybodytalksabout***, 161 Wash.2d 702, 708, 166 P.3d 693 (2007). A critical stage is one "in which a defendant's rights may be lost, defenses waived, privileges claimed or waived, or in which the outcome of the case is otherwise substantially affected." ***State v. Agtuca***, 12 Wash.App. 402, 404, 529 P.2d 1159 (1974).

A complete denial of counsel at a critical stage of the proceedings is presumptively prejudicial and calls for automatic reversal. ***United States v. Cronic***, 466 U.S. 648, 658–59, 659 n. 25, 104 S.Ct. 2039, 80 L.Ed.2d 657, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). Here, the intrusion in the his privilege communications occurred at a critical stage of the litigation. The right to assistance of counsel is specific to a particular offense and protects the accused throughout a criminal prosecution and following conviction. ***McNeil v. Wisconsin***, 501 U.S. 171, 175, 111 S.Ct. 2204, 115 L.Ed.2d 158 (1991). It applies to every " 'critical stage' of the proceedings." ***State v. Tinkham***, 74 Wash.App. 102, 109, 871 P.2d 1127

(1994) (quoting ***United States v. Wade***, 388 U.S. 218, 224–27, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967)). The United States Supreme Court has interpreted the right to apply "whenever necessary to assure a meaningful 'defense.' " ***Wade***, 388 U.S. at 225, 87 S.Ct. 1926.The constitutional right to have the assistance of counsel arises at any critical stage of the proceedings, and a critical stage is one in which there is a possibility that a defendant is or would be prejudiced in the defense of his case. ***State v. Jackson***, 66 Wash.2d 24, 400 P.2d 774 (1965). A stage is critical if it presents a possibility of prejudice to the defendant. See, e.g., ***Garrison v. Rhay***, 75 Wash.2d 98, 102, 449 P.2d 92 (1968).

The State's action was made more egregious than that contained in ***Granacki***, and ***Garza*** where structural error was rejected because the State seemed to view the *in camera* review as a cure to the violation. Mr. Amos argues that the *in camera* review was essentially meaningless and certainly did not have a prophylactic effect of somehow "curing" the intrusion. As a side note, no motion was filed by either party for *in camera* review; review was suggested by DPA Halstead during a hearing and the bagged material was evidently transported to Superior Court Judge Nelson Hunt by Officer Haggerty, who reviewed the seized material, "pull[ing] aside a few documents that [the officer] was not allowed to see". Affidavit of Haggerty at 3. Mr. Amos' counsel was not present for the review.

Rather than avoid the practices strongly condemned in ***Cory***, ***Garza***, ***Granacki,*** and their progeny, the State should have sought disclosure through the criminal discovery rule CrR 4.7, instead of obtaining a warrant under CrR 2.3. CrR 4.7 was the appropriate vehicle to obtain the desired records. The case was at a "critical stage"; Mr. Amos had been arraigned and was appointed counsel. By utilizing CrR 4.7, the State would then be able to request an in camera review See e.g. ***State v. Kalakosky***, 121 Wash.2d 525, 550, 852 P.2d 1064 (1993).

The case represents an appalling violation of the attorney client relationship through outrageous government interference. The State had reasonable remedies available, including use of CrR 4.7 in order to ascertain if evidence of other crimes was present. The State instead elected to execute a wholesale search of Mr. Amos cell and seize a large amount of papers, letters and other material, without regard for the confidentiality inherent in some or all of the documents seized. This action should not be condoned. A long line of cases in Washington cited herein and in previously -filed pleadings, make clear that the remedy for this type of activity requires dismissal of the charges. This case falls squarely within ***Perrow*** and its progeny, and dismissal is mandated.

3. THIS COURT SHOULD INDEPENDENTLY REVIEW THE SEIZED DOCUMENTS

This Court has the option of independently reviewing the seized records that were reviewed by the trial court. An accused is entitled to an *in camera* review of records that are subject to a claim of privilege or confidentiality, to determine whether the records contain exculpatory or impeaching information, or could lead to such, and which portions of the records are protected. ***State v. Casal***, 103 Wn.2d 812, 822-23, 699 P.2d 1234 (1985); CrR 4.7(h)(6).

"The appellate courts will not act as a rubber stamp for the trial Court's *in camera* hearing process. The record of the hearing must be made available to the appellate court." ***State v. Wolken***, 103 Wn.2d 823, 829, 700 P.2d 319 (1985). This Court should make an in dependent review of the record to determine whether it contains information that should have been, but was not, considered confidential and privileged attorney/client communication. ***Casal***, 103 Wn.2d at 822-23. Independent review by this Court will show whether the trial court erred in determining that the intrusion and seizure of Mr. Amos' material merited sanction up to and including dismissal of the then-pending charges.

C. CONCLUSION

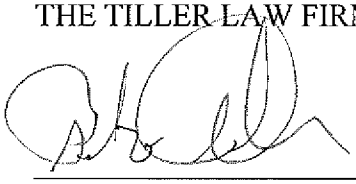
For the reasons stated herein, and in the petitioner's opening and supplemental briefs, Mr. Amos respectfully requests this Court to dismiss

the convictions in accordance with ***Perrow***.

This Court should conduct an independent review of the seized documents already reviewed by the trial court if merited.

DATED: March 31, 2017.

Respectfully submitted,
THE TILLER LAW FIRM



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CERTIFICATE

I certify that I sent by JIS a copy of the Reply Brief of Petitioner to Clerk of Court of Appeals and to Ms. Sara Beigh, Deputy Prosecuting Attorney, and mailed copies, postage prepaid on March 31, 2017, to appellant, Forest Amos:

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